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13 ZUBAIR KAZI

14
15 UNITED STATES DISTRICT COURT
16
17 CENTRAL DISTRICT OF CALIFORNIA

18 IN RE CRYOBANKS
19 INTERNATIONAL DERIVATIVE
20 LITIGATION

21 PENNY MCCOY and
22 CHANDRASHEKHAR R. JOSHI,
23 M.D.,

24 Plaintiff,

25 vs.

26 ZUBAIR KAZI; KAZI FOODS, INC.;
27 KAZI MANAGEMENT VI, LLC;

28 Defendants.

29 CRYOBANKS INTERNATIONAL,
30 INC.,

31 Nominal Defendant

32 } Case No.: CV 08-07244 SJO (Cwx)
33 } Judge: Hon. S. James Otero

34 } **DEFENDANT ZUBAIR KAZI'S
35 NOTICE OF MOTION AND
36 MOTION TO PRECLUDE
37 EVIDENCE, TESTIMONY, OR
38 ARGUMENT CONCERNING ANY
39 ALLEGED EXTRA-MARITAL
40 AFFAIRS ENGAGED IN BY
41 DEFENDANT**
42 } [FRE 402, 403 and 404]

43 } MOTION IN LIMINE NO. 1

44 } Accompanying Documents
45 } • Declaration Of Sean M. Bryn
46 } • [Proposed] Order

47 } Date: August 10, 2010 [First Day of
48 } Trial]
49 } Time: 9:00 a.m.
50 } Room: 1
51 } Judge: Hon. S. James Otero

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD**
2 **HEREIN:**

3 PLEASE TAKE NOTICE that on August 10, 2010, at 9:00 a.m. [first day
4 of trial], before the Honorable S. James Otero, Judge of the United States District
5 Court, in Courtroom 1 of the above-entitled Court, located at 312 North Spring
6 Street, Los Angeles, California, 90012, Defendant Zubair Kazi ("Kazi") will and
7 hereby does move *in limine* to preclude the introduction of evidence, testimony,
8 and/or argument in the presence of the jury concerning any and all allegations
9 that Mr. Kazi engaged in any extra-marital affairs and/or conceived any children
10 out of wed-lock.

11 This motion is brought pursuant to Rules 402, 403 and 404 of the Federal
12 *Rules of Evidence* ("F.R.E.") and prevailing case law, on the grounds that
13 testimony, evidence, or argument concerning any alleged extra-marital affairs
14 that Mr. Kazi engaged in, or Mr. Kazi's purported fathering of children out of
15 wed-lock is not relevant, is woefully prejudicial, is a needless waste of time,
16 confuses the relevant issues, and is improper character evidence. Thus, such
17 evidence is inadmissible and is not appropriate to raise at trial.

18 This Motion is based upon this notice, the accompanying memorandum of
19 points and authorities, the accompanying declaration of Sean M. Bryn with the
20 exhibits attached thereto ("Bryn Dec."), upon all the pleadings and papers that are
21 on file in this action, and all oral and documentary evidence that may be
22 presented at the time of the hearing on this motion.

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This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on June 25, 2010. (Bryn Dec. at ¶3.)

Respectfully submitted,

Dated: July 6, 2010

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

By:

Patrick M. Kelly
Martin K. Deniston
Sean M. Bryn
Attorneys for Defendant ZUBAIR
KAZI

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The present action is a shareholder derivative lawsuit arising from monies that were invested in Cyrobanks International, Inc. (“Cyrobanks”), a corporation that obtains, processes, and stores cord blood stem cells for potential private and public biotechnical and medical use. . Defendant Zubair Kazi (“Kazi”) is the principal of Defendant Kazi Management VI, LLC (“KMVI”). KMVI is the majority shareholder of Cyrobanks. Cryobanks’ viability as a company was always in question, predating the alleged wrongful conduct of Defendant Zubair Kazi (“Kazi”). Mr. Kazi did not become involved with Cryobanks until approximately late 1999. Thereafter, despite Defendants Zubair Kazi and later, Defendant investing several million dollars, including making loans to Cryobanks, and being the financial life-support for Cryobanks, Plaintiffs allege that Mr. Kazi acted improperly. Indeed, Plaintiff Joshi testified that he believed that Mr. Kazi had to do anything and everything to make sure that Cryobanks succeeded.

Rather than focus on the relevant issues, Kazi anticipates that at the time of trial, Plaintiff Penny McCoy (“McCoy”) and/or Plaintiff Dr. Chandrasekhar Joshi (“Joshi”)¹ may improperly attempt to introduce at trial evidence, testimony, or argument concerning any alleged extra-marital affairs that Kazi engaged in, and/or allegations of Kazi’s purported fathering of children out of wed-lock. These issues were raised both affirmatively by Plaintiff Joshi at his deposition, and by testimony elicited from Kazi at deposition by Plaintiff McCoy’s counsel. (See Exhibits 1 & 2 to Declaration of Sean M. Bryn filed concurrently herewith [“Bryn Dec.”].) Such evidence is completely irrelevant, is woefully prejudicial, and is inadmissible character evidence. Moreover, it is highly speculative. Plaintiffs have failed to

¹ Sometimes herein McCoy and Joshi are collectively referred to as “Plaintiffs.”

1 produce any competent evidence to support their erroneous and outlandish
 2 arguments concerning these contentions about Mr. Kazi. Thus, not only is it error
 3 to allow Plaintiffs to even suggest such allegations at trial, it is especially troubling
 4 given the fact that Plaintiffs have no credible evidence to substantiate their
 5 position. It is nothing but an improper attempt to prejudice the jury against Kazi.

6 Accordingly, any testimony, documents, evidence or argument on these
 7 issues are improper, an unnecessary undue consumption of time, are unduly
 8 prejudicial, and are irrelevant to the issues in this case. As such, the evidence
 9 violates Federal *Rules of Evidence* 402, 403 and 404, not to mention all notions of
 10 due process and decorum. It should therefore be precluded.

11 **II. STATEMENT OF THE RELEVANT FACTS**

12 The present action involves shareholder derivative claims by two separate
 13 Plaintiffs, Penny McCoy and Dr. Chandrasekhar Joshi. Both McCoy and Joshi are
 14 suing Defendant Zubair Kazi in a representative capacity. Joshi is also suing
 15 individually. Plaintiffs contend that Mr. Kazi purportedly mismanaged Cyrobanks,
 16 resulting in the shareholders losing money. Cyrobanks is a corporation that
 17 obtains, processes, and stores cord blood stem cells for potential private and public
 18 biotechnical and medical use. Cyrobanks' viability as a company was always in
 19 question, predating the alleged wrongful conduct of Defendant Zubair Kazi
 20 ("Kazi"). Mr. Kazi did not become involved with Cyrobanks until approximately
 21 late 1999. Thereafter, despite Defendants Zubair Kazi and later, Defendant
 22 investing several million dollars, including making loans to Cyrobanks, and being
 23 the financial life-support for Cyrobanks, Plaintiffs allege that Mr. Kazi acted
 24 improperly.

25 During the discovery process in this matter, Plaintiffs provided through the
 26 deposition of Plaintiff Joshi, and attempted to elicit from Kazi, testimony that Kazi
 27 allegedly engaged in multiple extra-marital affairs, was purportedly cheating on his
 28 wife, had "girls" arranged for him while in India, and that Kazi allegedly fathered

1 children through these extra-marital affairs. (The pertinent pages from Joshi's
 2 Deposition transcript are collectively attached as Ex. 1 to Bryn Dec.; the pertinent
 3 pages from Kazi's Deposition transcript are collectively attached as Ex. 2 to Bryn
 4 Dec.) When asked what effect Mr. Kazi's alleged affairs had on the present
 5 lawsuit, Dr. Joshi responded:

6 "Well, I think he [Kazi] never paid attention to the company as
 7 much as he should have, and that house was in constant turmoil."

8 (Joshi Dep., 122:23- 123:2, Ex. 1 to Bryn Dec.)

9 Kazi anticipates that at the time of trial, Plaintiffs might improperly attempt
 10 to introduce evidence or argument concerning their unfounded claims that Kazi
 11 engaged in extra-marital affairs. Kazi submits that the presentation of such
 12 evidence is woefully improper, and therefore seeks an Order precluding Plaintiffs
 13 from seeking to introduce such evidence or argument at trial.

14 **III. GIVEN THAT TESTIMONY, ARGUMENT, AND EVIDENCE OF**
 15 **ANY ALLEGED EXTRA-MARITAL AFFAIRS BY KAZI HAS NOTHING**
 16 **TO DO WITH THE PRESENT CASE, AND WILL DETRIMENTALLY**
 17 **PREJUDICE KAZI, THEY SHOULD NOT BE INTRODUCED AT TRIAL.**

18 **A. Because this Motion *in Limine* Advances the Principles of Judicial**
 19 **Economy and Efficiency, it Should be Granted.**

20 It is well-settled that motions *in limine* allow parties to obtain advance
 21 rulings on the admissibility of evidence at trial, allowing them to take those rulings
 22 in context in trial planning. Handling evidentiary issues prior to trial also allows
 23 for more thorough consideration of the issues, promoting trial efficiency. *In re*
 24 *Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 260 (3d Cir.
 25 1983). *In limine* motions allow the court to determine in advance the relevance of
 26 evidence to material issues in the case. *Associated Press v. District Court for the*
 27 *Fifth Judicial District*, 542 U.S. 1301, 1303, 125 S. Ct. 1, 2 (2004). Motions *in*
 28 *limine* help with the advance planning of trial, both for the parties and for the court.

1 *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979). Hence, granting the
 2 present motion is not only proper from a substantive perspective, it will also
 3 procedurally benefit the court, the parties, and the jury.

4 **B. Evidence or Argument Concerning Kazi's Alleged Extra-Marital**
 5 **Affairs is Irrelevant and Inadmissible Character Evidence, Which**
 6 **Should be Excluded From Introduction at Trial.**

7 It is well-settled that only relevant evidence is admissible at trial. Rule 402
 8 of the Federal *Rules of Evidence* ("F.R.E.") The definition of relevant evidence is
 9 codified in *F.R.E.* 401, which provides:

10 “Relevant evidence” means evidence having any tendency to
 11 make the existence of any fact that is of consequence to the
 12 determination of the action more probable or less probable than it
 13 would be without the evidence.”

14 Here, there is simply no relevance to Plaintiffs' alleged and unsubstantiated
 15 contentions that Mr. Kazi purportedly engaged in extra-marital affairs and/or
 16 fathered any children out of wed-lock. There is not even a remote connection
 17 between these outlandish contentions and Plaintiffs' shareholder derivate claims
 18 against Mr. Kazi.

19 Moreover, as a general matter, evidence of other wrongs or acts is not
 20 admissible in a civil action to prove the character of a person in order to show
 21 action in conformity therewith. *F.R.E.* 404. Thus, Plaintiffs cannot use evidence
 22 that Kazi purportedly had extramarital affairs and/or fathered children out of wed-
 23 lock to prove that Kazi allegedly mismanaged Cyrobanks. The evidence also has
 24 no bearing on Kazi's truthfulness (see *F.R.E.* 608(b).) At most, it would simply be
 25 introduced by Plaintiffs to portray Kazi as a “bad person” and therefore unworthy
 26 of belief—efforts which are completely inappropriate and should be rejected by the
 27 Court outright.

1 **C. Evidence of Kazi's Alleged Extra-Marital Affairs Is Woefully**
 2 **Prejudicial and Violates F.R.E. 403.**

3 Federal *Rule of Evidence* 403 states:

4 “Although relevant, evidence may be excluded if its probative
 5 value is substantially outweighed by the danger of unfair prejudice,
 6 confusion of the issues, or misleading the jury, or by considerations of
 7 undue delay, waste of time, or needless presentation of cumulative
 8 evidence.”

9 There is no justifiable (or imaginable) basis to admit any evidence or
 10 testimony concerning any purported extra-marital affairs that Mr. Kazi allegedly
 11 engaged in, or his claimed fathering of children out of wed-lock. As discussed
 12 above, the present case is a shareholder derivative action, the gravamen of which
 13 is Plaintiffs' contentions that Kazi mismanaged the business of Cyrobanks
 14 resulting in Plaintiffs losing money that they invested into Cyrobanks. Not only
 15 does Kazi dispute the merits of Plaintiffs' allegations that he purportedly had extra-
 16 marital affairs, there is simply no reason to allow the introduction of evidence
 17 concerning Plaintiffs' unsubstantiated claims about Kazi's personal business. Such
 18 evidence nothing to do with any of the facts of this case.

19 Conversely, the evidence is woefully prejudicial. It is indisputable that
 20 extra-marital affairs and parenting children as a result of extra-marital affairs have
 21 adverse stigmas associated with them. Allowing the jury to hear such evidence
 22 might cause them to dislike Kazi and rule against him merely because of the jury's
 23 disdain. There is also a grave risk that this evidence might mislead and/or confuse
 24 the jury, and it will lengthen the trial because Kazi will be required to defend
 25 against the Plaintiffs' allegations. This means that Kazi will have to call additional
 26 witnesses and introduce other additional evidence, including possibly extra
 27 documents, to refute Plaintiffs' contentions.

1 Moreover, and significantly, allowing Plaintiffs to introduce evidence about
 2 their unsubstantiated contentions concerning Kazi's alleged affairs is misleading
 3 and confusing for the jury. Allowing Plaintiffs to engage in speculation and
 4 conjecture, at best, and to make highly prejudicial claims at worst, is woefully
 5 improper. Such behavior should not be condoned.

6 Indeed, these risks greatly outweigh any possible probative value that such
 7 evidence might have. While Kazi submits that there is no truth and no probative
 8 value whatsoever to the evidence, and that the evidence is irrelevant, the single
 9 explanation provided by Plaintiffs is through Joshi's deposition testimony: that the
 10 purported extra-marital affairs distracted Kazi from his management and dealings
 11 with Cyrobanks. (Joshi Dep., 122:23- 123:2, Ex. 1 to Bryn Dec.) To the extent
 12 that Plaintiffs wish to advance a theory at trial that Kazi did not pay sufficient
 13 attention to the business of Cyrobanks, they can certainly do so through means
 14 other than contending that Kazi had extra-marital affairs. Any probative value that
 15 Plaintiffs might obtain from evidence of the affair is greatly outweighed by the
 16 danger of unfair prejudice, of misleading the jury, of confusing the issues, and of
 17 unnecessarily lengthening the trial. Thus, the evidence should be excluded.

18 **IV. ALTERNATIVELY, IF THIS MOTION IS DENIED, NO**
 19 **REFERENCE TO THE SUBJECT MATTER SHOULD BE**
 20 **PERMITTED UNTIL THE COURT, PURSUANT TO FRE 104,**
 21 **DETERMINES THAT AN ADEQUATE FOUNDATION EXISTS FOR**
 22 **THE EVIDENCE.**

23 The admissibility of evidence of Kazi's alleged extra-marital affair and/or
 24 parenting a child out of wed-lock depends on (1) whether the party introducing the
 25 evidence is a qualified witness and (2) whether an adequate or factual and legal
 26 foundation exists to support the testimony. If not, the evidence is irrelevant and
 27 should be excluded. In the alternative, Kazi requests that no reference to this
 28 subject matter should be made to the jury unless, and/or until, the court determines

1 pursuant to *F.R.E.* 104 that there is a proper foundation for the evidence to be
2 admissible at trial. Additionally, should the court allow evidence of Kazi's alleged
3 affair and/or fathering of a child as a result of the affair to be introduced into
4 evidence at trial, Kazi requests that an instruction be provided to the jury limiting
5 the application and use of the evidence.

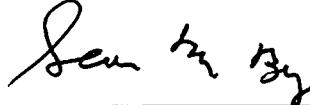
6 **V. CONCLUSION**

7 Based on the foregoing, Defendant Zubair Kazi respectfully requests that the
8 court exclude any testimony, evidence, or argument concerning Kazi's alleged
9 extra-marital affair and Kazi's alleged fathering of children as a result of the affair.
10

11 Dated: July 2, 2010

Respectfully submitted,

12 WILSON, ELSER, MOSKOWITZ,
13 EDELMAN & DICKER LLP

14
15 By: 

16 Patrick M. Kelly
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18 Sean M. Bryn
19 Attorneys for Defendant ZUBAIR
20 KAZI
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